82-1499

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY MARQUEZ, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court Of Criminal Appeals Of Texas

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

(1) Whether the refusal of the Texas Court to apply the state statutory standards for "arrest," to activity of a police officer that admittedly was intended to prevent movement of the appellant for an indefinite period of time, violated the fourth amendment.

(2) Whether the area on the floor and beneath the front passenger seat of a standing automobile in which this appellant was seated when the appellant was the subject of investigation by officers is subject to a protective search for weapons under the fourth amendment.

(3) Whether an object not shown by its nature to resemble either a weapon or a container for a weapon, located on the floorboard by the right front passenger seat of a standing automobile, is subject to seizure during a "frisk" or protective search under the fourth amendment.

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IN THE

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No. ____

LARRY MARQUEZ, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court Of Criminal Appeals Of Texas

JURISDICTIONAL STATEMENT

Larry Marquez, the Appellant, appeals from the final judgment of the Court of Criminal Appeals of the State of Texas, which by its opinion dated September 15, 1982 affirmed his conviction.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, which has not yet been reported, appears in Appendix A hereto, p. 1a. *infra*.

JURISDICTION

The opinion of the Texas Court of Criminal Appeals affirming Appellant's conviction was rendered on September 15, 1982. Appellant's motion for rehearing was denied on November 24, 1982. On January 4, 1983, Appellant's motion to vacate the conviction, in part based

on a supervening interpretation of a state statute, Texas Code of Criminal Procedure, article 15.22, was denied.

Notice of Appeal to this Court was duly filed in the Texas Court of Criminal Appeals on March 7, 1983. See Appendix page 4a. *infra.*

This appeal is being docketed in this Court within ninety (90) days from the date the judgment became final that being fifteen (15) days from the ruling on the Final Motion for Rehearing. See Appendix page 3a, *infra*, and the Tex. Code Crim. Proc. Art. 4204a(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE

The Fourth Amendment of the United States Constitution reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article 15.22, Texas Code of Criminal Procedure:

> "A person is arrested when *he has actually been placed under restraint* or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." (Emphasis added)

Raising The Federal Question

In a motion to suppress evidence filed in the trial court prior to his trial, Appellant raised the claim that a search and seizure which resulted in the obtaining of evidence

that was later admitted against him at trial was unconstitutional under the Fourth Amendment to the United States Constitution. Appellant reiterated his Fourth Amendment claim before the Texas Court of Criminal Appeals which characterized the case as "much like the 'stop and frisk' situation described in *Terry* v. *Ohio*, 392 U.S. 1 (1967)" and rejected Appellant's federal constitutional claim.

Appellant's Motion for Leave to File Rehearing was denied on November 24, 1982 and the judgment of the Court of Criminal Appeals became final on December 9, 1982. On December 31, 1982, Appellant filed a Motion to Vacate the original judgment of conviction based on a decision of the Texas Court dated December 8, 1982, interpreting the definition of "arrest" under Texas Code of Criminal Procedure, article 15.22, niz, *Linnett* v. *State*, No. 63,864. See p. 1a, *infra*. The Court's refusal to apply that statute to this case renders the holding of the court unconstitutional.

Statement Of The Case

At about 7:00 a.m. in the morning of March 4, 1978, an anonymous telephone caller advised Texas Department of Public Safety Officer Phil Altman in San Angelo, Texas that an individual named Abelardo Garcia, would be traveling later that day from San Angelo, Texas to Big Spring, Texas, a distance of approximately 80 miles, in a red 1974 Chevrolet automobile, bearing license plate EYY518. The anonymous caller further advised that Garcia would buy heroin from Appellant, Larry Marquez, in the vicinity of the Gibson department store parking lot at about noon of that same day. After receiving the call, Officer Altman proceeded to Big Spring, in "lock step" with the vendee's red Chevrolet, arriving before noon. While operating a moving surveillance around the Gibson

parking lot, Officer Altman and his San Angelo Police Department partner, observed the red Chevrolet, as described by the anonymous caller. It parked in the Veterans' Administration Hospital parking lot across from Gibson's Discount Center in Big Spring, Texas. After the officers observed another vehicle, occupied by Appellant (in the front passenger seat) and another, drive up beside the parked red Chevrolet vehicle, they drove their police vehicle up behind the automobile occupied by Appellant, completely blocking its movement. Officer Altman, accompanied by a San Angelo officer, then got out of his Department of Public Safety vehicle and walked to the driver's side of Appellant's vehicle.

Officer Altman admitted to the prosecutor on direct examination, that his automobile was deliberately used to block "any type of escape should it be attempted" and that he intended to continue the "investigation" until something "turned up" but if it did not he would have "turned him loose."

Officer Altman testified that from the opposite side of the Appellant's vehicle, he saw Appellant make an "abrupt gesture" under the right front seat of the vehicle. Officer Altman's companion officer who was on the right front passenger side of the car, never testified concerning the alleged abrupt gesture, not being called by either party. This, coupled with Officer Altman's information that Appellant was a drug dealer who, like many drug dealers, commonly carried a gun, allegedly led him to believe that Appellant was possibly hiding a weapon under the seat. On the basis of this testimony and the officer's statement that he was "alarmed," the Texas court concluded that Altman reasonably believed that a weapon would be found under the seat and that for his

own safety he should obtain that weapon. Officer Altman testified on direct concerning what he was looking for:

> "I really don't know what was there, but I thought it was a possibility there could have been a weapon there."

There was considerable evidence that Officer Altman searched the area under the seat occupied by Appellant and removed a plastic bag therefrom *after* the Appellant had been removed from the vehicle. In its opinion, however, the Texas Court (presumably viewing the facts in a light most favorable to upholding of the search and seizure) proceeded on the assumption that the seizure of the bag occurred while the Appellant was still seated in the automobile. According to the court, Officer Altman grabbed the Appellant's right wrist with one hand, "stuck my pistol back in my belt," and reached to the floorboard right at the front edge of the seat, and immediately retrieved a plastic bag containing a brown powdery substance later determined to be 5.11 grams of 5% (or .29 grams) of heroin.

The trial court, after a hearing, denied Appellant's motion to suppress the heroin found in the plastic bag and admitted it into evidence. Appellant was convicted of possession of heroin and sentenced to ten (10) years' imprisonment. The Texas Court of Criminal Appeals affirmed the conviction, holding that the seizure was proper under *Terry* v. *Ohio*, 392 U.S. 1 (1968).

The Questions Are Substantial

The questions presented in this case are not run-of-the mill Fourth Amendment issues involving merely application of settled principles to a specific fact situation. Instead, they are substantial and important questions with respect the definition of an "arrest" vis-a-vis a "stop"

under the Fourth Amendment, and the outer limit of a permissible protective search for weapons under the "stop-and-frisk" exception to the warrant requirement of *Terry* v. *Ohio*. Neither question has been directly addressed and settled by this Court. The fact situation here involved would afford the Court an excellent vehicle in which to lay down the law on these points.

In this case, the Texas Court of Criminal Appeals incorrectly characterized the challenged activity of the police officer as pursuant to an "investigative stop" contrary to the state's own statutory definition of "arrest." However, under that definition, the critical issue is whether the detained individual is free to leave. This Court has not drawn a clear line between a "stop," on one hand, and an "arrest," on the other for federal constitutional purposes. This case provides an opportunity for it to do so.

The second question concerns the two-dimensional scope of a protective search for weapons, an issue now before this Court. *Michigan* v. *Long*, No. 82-256. The Texas court in this case assumed that the proper range in scope of a protective search or "frisk" for weapons extends beyond persons and is coextensive with that of a search incident to a lawful arrest. The Michigan Supreme Court in the case now before this Court held otherwise.

The third question presented on this appeal involves the "third dimension" of a limited protective search for weapons. *Terry* v. *Ohio*, 392 U.S. 1 (1968) and *Sibron* v. *New York*, 392 U.S. 40 (1968) can be read as concluding that only those objects discovered during a "frisk" that feel like potential instruments of assault or which could contain such instruments are subject to seizure. The decision of the Texas Court of Criminal Appeals in this case makes anything within the immediate control of the per-

son frisked subject to seizure. Therefore, it is contrary to the general principle underlying the Fouth Amendment that the proper scope of a search is determined by its initial justification.

CONCLUSION

For these reasons, this Court should note probable jurisdiction and take jurisdiction of this appeal.

Respectfully submitted,

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NO. 62,867

LARRY MARQUEZ, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from HOWARD County

OPINION

The appellant was convicted by the jury of possession of heroin. The jury then assessed punishment at confinement for ten years.

In his first two grounds of error, the appellant contends that the heroin seized from him was inadmissible because the initial investigatory stop was unjustified, and because the subsequent warrantless search and seizure was not justified by exigent circumstances.

At the pre-trial suppression hearing Phil Altman testified that at the time of the appellant's arrest he was an officer with the Department of Public Safety in San Angelo. At about 7:00 A.M. on the morning of March 4, 1978, he received a phone call from the San Angelo Police Department asking for his assistance in a narcotics surveillance. Later that morning, he received information that Abelardo Garcia would be travelling to Big Spring to buy a quantity of heroin from the appellant. According to the informant, the buy was to take place about noon that day in the vicinity of a Gibson's store. Altman also learned that Garcia was in a red 1964 Chevrolet with license number EYY 518.

Altman arrived in Big Spring between 11:00 and 11:30. He set up a "moving surveillance" looking for the Garcia vehicle. In a short period of time he spotted the described vehicle

parked in the parking lot for a Veteran's Administration hospital directly across the street from Gibson's. Garcia was in the car alone.

Altman then set up a "stationary surveillance" while he awaited the arrival of the appellant. About 12:00 noon he saw the appellant and another man arrive and park next to the red car occupied by Garcia. Altman first verified that the appellant was in the blue and white car which parked by Garcia's car, then parked his car behind the appellant's car to block any escape. He approached the driver's side of the appellant's car. As Altman got close to the car, the appellant saw Altman approaching and made "a very quick abrupt gesture under the seat, under the front seat of the vehicle."

Altman testified that he thought the appellant was possibly hiding a pistol or grabbing one. He drew his gun, ran around to the passenger side of the car, where the appellant was seated, and grabbed the appellant with one hand while he reached under the seat with the other. Altman discovered a plastic bag containing a brown powder which laboratory analysis showed to be heroin.

Altman also testified that he knew both the appellant and Garcia on sight, that he knew both men to be drug dealers, that the appellant, like many drug dealers, sometimes carried a gun, and that he searched under the front seat because he feared for his safety.

The appellant argues that there was insufficient evidence of specific and articulable circumstances to justify an investigatory stop. He relies heavily upon this court's opinion in Ebarb v. State, 598 S.W.2d 842 (Tex.Cr.App. 1979). In the original opinion in that case the court stated:

> ". . . police officers are not required to shrug their shoulders and permit crime to occur and criminals to escape, even when probable cause to arrest or search does not exist. Circumstances short of probable cause for arrest may justify temporary detention for purposes of investigation. [citations omitted] But in order to justify the

> intrusion, the law enforcement officer must have specific articulable facts which, in light of his experience and personal knowledge, together with other inferences from those facts, would reasonably warrant the intrusion on the freedom of the citizen detained for further investigation. [citation omitted] The reason for having this requirement for specific articulable facts is so a magistrate can, at a later date, examine the circumstances to ensure that the constitutional rights of the citizenry have been observed." *Id.* at 844.

In that case the defendant was arrested solely upon the basis of an unnamed informant whose past reliability was not shown by the State. The court held that the State had failed to justify the stop. It had failed to show the court evidence which would enable the court to evaluate the reliability of the informant or the reliability of the information.

In the present case, the State presented no evidence concerning the source of the information received by Altman, other than Altman's testimony that he was called by the San Angelo Police Department. However, we need not reach the issue decided in *Ebarb*, for the evidence in this case shows that the initial investigatory stop was not based solely upon the information received by Altman that morning. Rather, this record shows that the investigatory stop was reasonable, considering only Altman's personal knowledge and observations.

Altman testified that he knew Abelardo Garcia to be a drug dealer and that he had arrested Garcia on a previous narcotics investigation. Altman personally observed Garcia parked in the hospital parking lot in Big Spring, some eighty miles from Garcia's home in San Angelo. Altman also personally observed the arrival of the appellant, saw him park next to Garcia in the parking lot, and saw Garcia get into the appellant's car. Altman knew that the appellant was known to be dealing in heroin, and that on most occasions the transactions took place near the Gibson's parking lot. According to Altman's testimony, all these facts and beliefs were based upon his prior personal knowledge of the two men and upon his observations at the scene that day. Clearly then, his decision to make a further

investigation was not based solely upon the information he received that morning. Whatever the source of the information he received that morning, his own knowledge justified further investigation to see whether criminal activity was taking place. The initial investigatory stop was justified under the circumstances of this case. The first ground of error is overruled.

The appellant's second ground of error contends that the seizure of the heroin was not made pursuant to an arrest warrant and the State failed to show that exigent circumstances excused the officer's failure to obtain one.

As noted above, Altman had information that the appellant was a drug dealer and that he, like many drug dealers, commonly carried a gun. When he approached the car with his D.P.S. identification prominently displayed he saw the appellant make an "abrupt gesture." He believed that the appellant was either hiding or removing a gun. He testified that he feared for his safety.

These facts present a situation much like the "stop and frisk" situation described in Terry v. Ohio, 392 U.S. 1 (1967). The testimony shows that Altman reasonably believed that a weapon would be found under the seat occupied by the appellant and that for his own safety he should obtain that weapon. Under these facts Altman was not required to obtain a warrant to determine whether the appellant had easy access to a weapon. The ground of error is overruled.

In his third ground of error, the appellant contends that the heroin was inadmissible at his trial because the State failed to show an unbroken chain of custody. At trial the D.P.S. officer who delivered the heroin to the laboratory for analysis testified that he did not initial the evidence and that since the chemists were not present when he arrived, he dropped the heroin into an evidence box. The officer identified the exhibit offered at trial as the same exhibit he had delivered to the laboratory for analysis.

The chemist who testified at trial said that he removed the exhibit from the locked evidence box, that the box had not been

broken into, and that the exhibit offered at trial was the same exhibit he had analyzed.

The appellant's objections to the admissibility of the heroin, based upon discrepancies in the described color of the heroin, the D.P.S. officer's failure to initial the exhibit, and the fact that more than one person had access to the evidence box at the laboratory go to the weight of the evidence, not to its admissibility. The ground of error is overruled.

Finally, the appellant argues that his motion for change of venue should have been granted. His motion alleged that the appellant's family had a reputation in the community for dealing drugs. For this reason, he alleged that he could not obtain a fair and impartial trial. The motion was properly verified and supported by two affidavits. *See* V.A.C.C.P., Article 31.03. The State filed controverting affidavits as required by V.A.C.C.P., Article 31.04. The trial court heard testimony presented by both the appellant and the State, after which the court denied the motion. We note that most of the witnesses presented by the appellant were friends or neighbors of the appellant. The trial court was free to accept or reject all or part of the testimony offered by both parties. No abuse of discretion is shown. The ground of error is overruled.

The judgment is affirmed.

PER CURIAM

DELIVERED: 9/15/82

Panel 1, 2nd Quarter, 1982

COMPOSED OF: Truman Roberts, Judge
Tom G. Davis, Judge
W. C. Davis, Judge

Section 2 of the 1979 amendatory act provided:

"This Act applies to a prosecution commenced by the filing of an indictment or information on or after the effective date of this Act."

ARREST, COMMITMENT AND BAIL

CHAPTER FOURTEEN. ARREST WITHOUT WARRANT

Article

Art. 14.01. Offense Within View

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966. Amended by Acts 1967, 60th Leg., p. 1735, ch. 659, § 8, eff. Aug. 28, 1967.]

Art. 14.02. Within View of Magistrate

A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or

within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

Art. 14.03. Authority of Peace Officers

Any peace officer may arrest, without warrant:

(a) persons found in suspicious places under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws; or

(b) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to another person and the peace officer has probable cause to believe that there is immediate danger of further bodily injury to that person.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966. Amended by Acts 1967, 60th Leg., p. 1735, ch. 659, § 9, eff. Aug. 28, 1967; Acts 1981, 67th Leg., p. 1865, ch. 442, § 1, eff. Aug. 31, 1981.]

Art. 14.04. When Felony Has Been Committed

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

Art. 14.05. Rights of Officer

In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

Art. 14.06. Must Take Offender Before Magistrate

In each case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966. Amended by Acts 1967, 60th Leg., p. 1735, ch. 659, § 10, eff. Aug. 28, 1967.]

CHAPTER FIFTEEN. ARREST UNDER WARRANT

Article

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, November 24, 1982

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. 62,867 LARRY MARQUEZ

vs.

THE STATE OF TEXAS, *Appellee.*

Sincerely yours,

THOMAS LOWE, Clerk

In the Court of Criminal Appeals of the State of Texas

No. 62,867

LARRY MARQUEZ, *Appellant*

v.

STATE OF TEXAS, *Appellee*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Larry Marquez, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of the State of Texas, affirming the judgment of conviction, becoming final herein on December 9, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ George E. Gilkerson
GEORGE E. GILKERSON
Counsel for Appellant in
Court of Criminal Appeals

NO. 82-1499

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

LARRY MARQUEZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER APPELLANT'S NOTICE OF APPEAL WAS TIMELY FILED SO AS TO CONFER JURISDICTION ON THIS COURT.

II. WHETHER APPELLANT'S CLAIMS WERE RAISED IN THE COURT BELOW SO THAT THEY ARE PROPERLY BEFORE THIS COURT.

III. WHETHER EVIDENCE INTRODUCED AT APPELLANT'S TRIAL WAS OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE.

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NO. 82-1499

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

LARRY MARQUEZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, by and through its attorney, the Attorney General of Texas, and respectfully moves to dismiss the appeal or affirm the judgment of the Texas Court of Criminal Appeals denying Appellant the relief sought.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Appellant's conviction entered on September 15, 1982, is attached to the jurisdictional statement as an appendix.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein, in addition to the statutory and constitutional provisions cited by Appellant, is 28 U.S.C. §2101(d), which provides as follows:

> The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

Also involved is Rule 11 of the Rules of this Court, which provides, in pertinent part, as follows:

> .1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U.S.C. §§1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U.S.C. §2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.
>
> * * *
>
> .3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a

petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

STATEMENT OF THE CASE

Appellee is in substantial agreement with Appellant's statement of the case.

MOTION TO DISMISS OR AFFIRM

I. BECAUSE NOTICE OF APPEAL WAS NOT TIMELY FILED, THIS COURT LACKS JURISDICTION OVER THIS APPEAL.

Pursuant to 28 U.S.C. §2101(d) and Rule 11.1 of the Rules of this Court, Appellant was required to file notice of appeal within ninety days from the date of the judgment of the Court of Criminal Appeals. The decision of the Texas appellate court affirming Appellant's conviction was delivered September 15, 1982, and thus notice of appeal was due on or before December 13, 1982. Because notice of appeal was not filed until March 7, 1983, it was untimely in the extreme, and this Court does not have jurisdiction to entertain this appeal.

Appellant seeks to excuse his tardiness on several grounds. First, he claims that the filing of his motion for leave to file motion for rehearing in the state appellate court tolled the time for filing notice of appeal. This is incorrect. Rule 11.3 provides that the time for filing notice of appeal runs from the date of the denial of rehearing "if a petition for rehearing is timely filed . . ." Here,

however, the state appellate court denied leave to file the motion for rehearing. Because Appellant's motion for rehearing was not filed or considered on the merits, it did not extend the time for filing notice of appeal. *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940); *Morse v. United States*, 270 U.S. 151, 153 (1926). Similarly, Appellant's untimely motion to vacate conviction, for which there is no provision under state procedure, did not alter this time requirement. Finally, Appellant mistakenly asserts that the time for filing notice of appeal began to run from the date the state court's mandate was issued. In fact, however, it is the date of judgment from which the relevant time period is measured. Rule 11.3 provides that "[t]he time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered and *not from the date of the issuance of the mandate* . . ." (emphasis added). *See, Market St. R. Co. v. Railroad Commission*, 324 U.S. 548, 550-52 (1945).

II. THE QUESTIONS PRESENTED BY APPELLANT WERE NOT RAISED IN THE COURTS BELOW AND THEREFORE ARE NOT PROPERLY BEFORE THIS COURT.

In his jurisdictional statement, Appellant states the questions presented to be as follows:

> (1) Whether the refusal of the Texas Court to apply the state statutory standards for "arrest," to activity of a police officer that admittedly was intended to prevent movement of the appellant for an indefinite period of time, violated the fourth amendment.
>
> (2) Whether the area on the floor and beneath the front passenger seat of a standing automobile in which this appellant was seated when the appellant was the subject of in-

> vestigation by officers is subject to a protective search for weapons under the fourth amendment.
>
> (3) Whether an object not shown by its nature to resemble either a weapon or a container for a weapon, located on the floorboard by the right front passenger seat of a standing automobile, is subject to seizure during a "frisk" or protective search under the fourth amendment.

In his brief to the Texas Court of Criminal Appeals, Appellant raised the following issues regarding the search and seizure:

> (1) The trial court erred in admitting evidence produced as the result of a warrantless search, because there was insufficient evidence of specific and articulable circumstances to justify the investigatory stop of the defendant.
>
> (2) The trial court erred in admitting evidence produced as the result of a warrantless search, because the prosecution failed to show exigent circumstances that made a search without a warrant imperative.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*,5 Cranch 344 (1809), and came to the conclusion

that the Judiciary Act of 1789, 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear in the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana, supra*, at 439.

Appellee submits that in view of Appellant's failure to raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, and the fact that a federal habeas remedy may remain if no state procedure for raising the issues is available to Appellant, the appeal should be denied for want of jurisdiction. *Cardinale v. Louisiana, supra*, at 439.

III. APPELLANT'S FOURTH AMENDMENT CLAIMS ARE UNWORTHY OF THIS COURT'S ATTENTION.

In rejecting Appellant's Fourth Amendment claims on direct appeal, the Texas appellate court held that "[t]he initial investigatory stop was justified under the circumstances of this case" and that the officer's fear that Appellant possessed a weapon constituted exigent circumstances due to which he "was not required to obtain a warrant . . ." Appellant has advanced no pertinent reasons why these holdings should be overturned. Moreover, these are factual issues which are insufficient to justify the exercise of this Court's jurisdiction. *Tacon v. Arizona*, 410 U.S. at 352; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the reasons stated, this appeal should either be dismissed or affirmed.

Respectfully submitted,

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